Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

JOHNNY WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the "reasonably capable" standard in Application Note 12 of U.S.S.G. § 2D1.1 precludes a court from sentencing a defendant on a drug quantity established in a "reverse sting" operation where the government provides the drug quantity at no charge to a defendant with no ability to purchase the drug quantity.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Johnny Williams requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on March 28, 1997.

OPINIONS BELOW

The decision of the court of appeals (Appendix A, pp. 1a - 22a, *infra*) is reported at 109 F.3d 502. The order of the district court (Appendix B, pp. 23a - 30a, *infra*) is not reported.

JURISDICTION

The decision of the court of appeals was issued on March 28, 1997. A timely petition for rehearing and suggestion for rehearing en banc was denied May 12, 1997. (Appendix C, p.31a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

United States Sentencing Guidelines § 2D1.1, in pertinent part, states as follows:

(a) Base Offense Level (Apply the greatest):

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(c) DRUG QUANTITY TABLE

(4) Level 32

- At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

The United States Sentencing Guidelines § 2D1.1, Application Note 12, in pertinent part, states as follows:

> In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to detemine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance - actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing.

STATEMENT

The Federal Bureau of Investigation began investigating Johnny Williams after arresting a drug courier who agreed to become a confidential informant in exchange for leniency. The FBI directed its confidential informant, Adriana Roman ("Roman"), to contact Mr. Williams and propose a "reverse sting" narcotics purchase. Roman, eager to reduce her exposure on the prior drug arrest, contacted Mr. Williams numerous times to engage in recorded discussions on a drug purchase. She also contacted Mr. Williams, with whom she had a prior romantic relationship, without informing her FBI counterparts, a violation of the FBI's directives.

Ultimately, Mr. Williams agreed to take part in a drug purchase limited to one to two kilograms of cocaine. Roman scheduled the "reverse sting" purchase for October 14, 1993. She did not establish a payment schedule or suggest that any amount of money would be required prior to the transfer of the cocaine. Indeed, the FBI knew from its surveillance and trash searches of the Williams's home that Mr. Williams had little access to funds, due in large part to substantial medical bills related to his sick wife.

The FBI recognized that a ten-year minimum sentence would apply if the transaction involved five kilograms of cocaine. Accordingly, the lead agent had Roman contact Mr. Williams on October 13, 1993, and suggest the sale weight be increased to five kilograms. On October 14, 1993, Roman met Mr. Williams at the American Inn hotel and presented him with five kilogram packages of cocaine priced at $18,000 per kilogram package.[1/] Roman testified that Mr. Williams had only $200 with him at the sale; he gave her this money to get something to eat. No request was made for the $90,000 sale amount, nor was there any discussion on how much of the $90,000 amount Mr. Williams could actually pay within a reasonable time. Indicative of his original agreement, Williams took possession of only

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1/ At sentencing, the district court noted that there was less than one kilogram of cocaine in each package, because the government failed to account for the packaging materials when weighing the cocaine.

one kilogram package and indicated he might have it sold. The remaining negotiations involved Mr. Williams telling Roman he could get "some" money by the next Saturday, to which she responded, "no problem."

FBI agents arrested Mr. Williams as he left the hotel with the one kilogram package. Following a first trial that resulted in a hung jury, the government convicted Mr. Williams after a second trial on one count of attempting to possess cocaine with the intent to distribute in violation of 21 U.S.C. §§ 841(a), 846. At sentencing the district court imposed a sentence at a base offense level 32 calculated through application of U.S.S.G. § 2D1.1 to a drug quantity of 5 - 15 kilograms of cocaine. The Eighth Circuit held that the district court's decision, in part, constituted an error because the district court's decision was based on an arbitrary assessment of responsibility for drug quantities unrelated to the five kilograms involved in the "reverse sting."

Regarding the five kilograms used in the reverse sting, the district court found that Mr. Williams had no present ability to produce the $90,000 needed to purchase outright the five kilograms but had made comments indicating the money to purchase the cocaine might be raised in the future by selling the cocaine.[2/] The Eighth Circuit affirmed, finding that Mr. Williams intended to purchase five kilograms and "appeared" reasonably capable of purchasing five kilograms. (Memorandum Opinion, at 18) (Appendix A). The court focused on Mr. Williams's apparent desire to purchase five kilograms:

> Based on his own words and actions, Williams agreed to purchase five kilograms of cocaine. Therefore, application note twelve requires that he be sentenced based upon that amount.
>
> (Memorandum Opinion, at 14) (Appendix A).

2/ At best, Mr. Williams's statements indicated he would try to sell the one kilogram of cocaine and then pay half of the amount due and owing to the government for the five kilograms. No statements specifically alluded to how or if Mr. Williams would pay the government the full price quoted for the cocaine.

The court concluded that Mr. Williams appeared capable of purchasing the cocaine. This capability, however, was premised on the fact that the government gave Mr. Williams five kilograms of cocaine at no charge. 3/

3/ In supporting its decision to affirm, the court noted that "fronting" cases had been addressed and upheld by the Eighth Circuit. (Memorandum Opinion, at 18, fn. 11). This, however, is not a "fronting" case. A "front" involves a deposit of less than the entire purchase price at the time of delivery with the remainder of the negotiated quantity "fronted," on a promise to pay. Typically, the government establishes the purchaser's ability to sell the drugs or involvement in prior "fronting" transactions. The government, however, provided Mr. Williams a zero-down, open-ended financing arrangement which constituted "giving" him the drugs. No reported case outlines a similar circumstance where the controlled delivery involved no demand for money.

REASONS FOR GRANTING THE WRIT

I. Application Note 12 Precludes Consideration Under U.S.S.G. § 2D1.1 of a Drug Quantity the Defendant Was Not Reasonably Capable of Purchasing in a "Reverse Sting."

The Eighth Circuit decision in this case constitutes a departure from established case law and creates a precedent that invalidates a significant provision within the United State Sentencing Guidelines.

Application Note 12, in relevant part, states:

> In a offense involving an agreement to sell a controlled substance, the agreed upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense.
>
> ...
>
> In contrast, in a reverse sting, the agreed upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing the agreed upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing. (Emphasis added).

U.S.S.G. 2D1.1 (November 1, 1995).

The present version of Application Note 12 incorporates a notable distinction from prior versions because it states a defendant

cannot be sentenced for a drug quantity which the defendant either did not intend to produce or was not reasonably capable of producing. Previous versions of Application Note 12 required evidence demonstrating there was no intent and no reasonable capability. See U.S.S.G. § 2D1.1, Application Note 12 (November 1, 1994).[4/] Accordingly, a defendant purchaser's intent or desire may be meaningless if the purchase is not "reasonably capable" of completing the criminal act orchestrated by the government.

Although the relevant language within Application Note 12 refers to the capability or intent to provide a controlled substance, the questions regarding "reasonably capable" and intent apply equally where the government provides the controlled substance for purchase by a defendant. See United States v. Ousley, 25 F.3d 588 (7th Cir. 1994) (consideration of Application Note 12 in a "reverse sting" case.). Contra United States v. Gomez, 103 F.3d 249 (2d Cir. 1997) (approving disparate treatment of defendants involved in "reverse sting" cases). In United States v. Raven, 39 F.3d 428 (3d Cir. 1994) the court reviewed a "reverse sting" case wherein the defendant argued that Application Note 12 applied. The Third Circuit stated:

> "[I]t seems to us fundamentally unfair that only in cases involving unconsummated drug transactions by sellers would the government have to demonstrate that the defendant intended and was able to complete the negotiated transaction. We do not believe the Sentencing Commission intended such a result."

The Eighth Circuit, without discussion, has applied the tenets of Application Note 12 in a "reverse sting" case. See United States v. Robinson, 22 F.3d 195 (8th Cir. 1994) (reducing guidelines calculation based on consideration of defendants' inability to produce

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4/ Application Note 12 was preceded by U.S.S.G. § 2D1.4, Application Note 1, which directed that where the district court found the defendant did not intend and was not reasonably capable of producing the negotiated amount of controlled substance, the court was required to exclude from the guidelines calculation that amount of controlled substance the defendant did not intend to produce and was not reasonably capable of producing.

funds necessary to purchase amount of cocaine attributed to them by the district court). The Eighth Circuit's ruling that Mr. Williams was reasonably capable of purchasing five kilograms of cocaine priced at $18,000/kilogram extends the concept of reasonable capability to the level of irrelevance. The court's opinion implicitly erases Application Note 12 from consideration in a "reverse sting" case. The court's ruling makes anyone "reasonably capable" because it affixes a stamp of approval on government-initiated transactions in amounts unilaterally established by the government on open-ended consignment terms with buyers that have no reasonable ability to produce the tens of thousands of dollars required to complete the transaction but through the sale of the drugs donated by the government. Accordingly, the reasonable capability of an individual to actually consummate a transaction of controlled substance initiated, planned and orchestrated by the government, is rendered meaningless in contravention of the Sentencing Guidelines.

The Eighth Circuit ruled:

> We similarly conclude that Williams was reasonably capable of purchasing the agreed-upon five kilograms of cocaine. Williams indicated that he would sell the cocaine to his contacts and then would pay Roman $18,000 per kilogram from the proceeds of his sales plus an additional $1,500 per kilogram for Roman's part in the transaction. When Williams met Roman on Thursday, October 14 he assured here that he would have half of the money by Saturday. At all times, Williams appeared to be confident that he would have no problem selling the cocaine and providing payment at an acceptable time. (Memorandum Opinion, at 18) (Appendix A).

The court's ruling was based on the government's willingness to give Mr. Williams five kilograms of cocaine for free on a no term, good faith, understanding that he, despite being practically broke,

would pay the $90,000 sale price.[5/] The court's ruling also relied on Mr. Williams's statements regarding the sale of one kilogram of cocaine and his apparent lack of concern over raising additional funds through the sale of additional kilograms.

It is uncontroverted that Mr. Williams had no access to funds in amounts sufficient to pay for even the one kilogram of cocaine he agreed to take from the "reverse sting." The issue is whether the defendant had the means necessary to go through with a purchase. See United States v. Howard, 998 F.2d 42, 51 (2d Cir. 1993) (issue is whether defendant had the means necessary); United States v. Caba, 955 F.2d 182,187 (2d Cir.) (question is whether the defendant could complete "the deal;" words, typically are insuffieient to establish reasonable capability), cert. denied, 113 S. Ct. 130 (1992).

The courts have looked beyond the words of a defendant to evaluate the reasonable ability of the defendant to effectuate his statements. As indicated in United States v. Hendrickson, 26 F.3d 321, 337 (2d Cir. 1994), when ability is lacking, "talk about selling or supplying narcotics often remains just that -- talk." A defendant's words must be supported by a plan to obtain, actual means of obtaining or access to funds that would permit obtaining, the negotiated amount of product. Id. No such plan or evidence of ability existed in the present case. The Eighth Circuit's reliance on an undefined "appearance" invalidates the purpose and legal effect of Application Note 12.

5/ The government, which conducted substantial surveillance of Mr. Williams, including extensive wiretapping and trash searches, knew that Mr. Williams had no money to purchase cocaine. Mr. Williams's financial situation was near disastrous. His wife was undergoing treatment for cancer. The Williams's had no insurance and were having to pay for all of her medical bills. Mr. Williams was delinquent on payments due on most of his debts. Although the government monitored contact between the informant and the appellant, the wiretap revealed no source of funds or finances available to purchase the huge quantity of narcotics offered by the government agent. A search of Mr. Williams's home revealed Mr. Williams had no funds available to purchase narcotics. Indeed, the government relied upon this known circumstance as the motivation for Mr. Williams to accept its entreaties to negotiate a zero-down, "pay when you like" drug transaction.

The only case that approaches the circumstances of this case is persuasive because it: 1) reveals that drug amounts promised on pure consignment terms have not been considered by other courts; and 2) demonstrates Mr. Williams's statements and conduct fail to rise to the level that has been deemed sufficient to constitute reasonable capability. In United States v. Ousley, 25 F.3d 588 (7th cir. 1994), Ousley negotiated a purchase of $60,000 worth of narcotics (six kilograms) but argued that he was only reasonably capable of purchasing 170 grams of cocaine because of his available financial resources at the time of the arrest. No transaction occurred but Ousley met with special agents, viewed the six kilograms, tested the cocaine and agreed to purchase the six kilograms. He assured them he had $60,000 "wrapped" and ready to go and promised delivery of the full amount upon the cocaine's delivery by the agent to another city. Notably, Ousley agreed to take twelve kilograms of cocaine, the six under negotiation and six kilograms on consignment:

> Mann offered Ousley an additional six kilograms of cocaine on a consignment basis. Ousley replied, "Okay, that can be handled." Agent Carew asked Ousley how long it would take him to sell twelve kilograms. Ousley estimated that it would take thirty days. Ousley told the agents he could buy fifteen or twenty kilograms a month. He assured the agents that he was reliable, and that others had entrusted him with large amounts of money in the past. Ousley stated that he currently had money for "six [kilograms] maybe a couple more." Id. at 592.

The additional consignment kilograms were never imputed in Ousley's sentencing calculation. The Seventh Circuit held that Ousley was reasonably capable of purchasing six kilograms because he had "scoffed" at agents during the reverse sting for thinking he was so naive as to bring such a large amount of money to a preliminary meeting. Ousley insisted he had access to the negotiated amount and guaranteed he would pay in full upon actual delivery of the cocaine. Moreover, the court stressed that the defendant had engaged in similar prior transactions where he had run up debts that were always covered and had prior convictions for dealing in narcotics. Id. at 598.

Similar to the additional consignment kilograms in Ousley, the government gave Mr. Williams cocaine with no requirement of payment. Distinct from a "fronting" case, this is a case where the government supplied cocaine for free. No down payment was required, no assurance was requested and no supporting investigation verified that Mr. Williams had the ability to "move" five kilograms of cocaine. Certainly, he did not have $60,000 in cash "wrapped" and ready to turn over in exchange for the cocaine. Indeed, Mr. Williams had no previous arrests or convictions for drug transactions.[6] Further, Mr. Williams's statements failed to approach the specific guarantees detailed in Ousley.

The Eighth Circuit's application of Note 12 erases the provision from the guidelines because "reasonably capable" encompasses any defendant in any situation. At the worst, Mr. Williams's statements contemplate only the sale of one kilogram of cocaine by Mr. Williams, which would purportedly supply sufficient funds to pay for half of the five kilograms delivered by the government.[7] In this regard, taking Mr. Williams at his word leaves him with only a reasonable capability to purchase 2½ kilograms of cocaine at the price of $18,000/kilogram established by the government.

The Eighth Circuit decision in United States v. Robinson, 22 F.3d 195 (8th Cir. 1994), also indicates the Eighth Circuit departed from prior legal interpretations by affirming Mr. Williams's sentence. Walter and Dion Robinson were arrested in a reverse sting involving the purchase of cocaine. Id. The government set-up involved the purchase of two to three kilograms of cocaine. The Robinsons, however, arrived at the site of the reverse sting with inadequate funds

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6/ The government asserted that Mr. Williams had involvement in previous drug transactions. The government's confidential informant, however, was so inconsistent as to be incredible. The informant's inability to tell a believable story caused the district court to not believe any single account regarding a previous transaction - which lead to its arbitrary "percentage" allocation theory that the Eighth Circuit found to be impermissible.

7/ Mr. Williams, in discussing the one kilogram package that he picked up during the "reverse sting," stated, " 'cause I'm thinking I got this one gone now."

to purchase the 2 to 3 kilograms of cocaine offered by the government agent. The brothers were convicted and sentenced under an offense level of 28 based upon 2 to 3 kilograms of cocaine. Id., citing, U.S.S.G. 2D1.1 (a)(3). The Eighth Circuit found that even if the brothers obtained additional money that was reasonably available, the total amount of cash on hand would have still been insufficient to purchase the quantity of narcotics that the district court used for sentencing. Robinson's explicit intention to purchase two kilograms did not override the evident practical financial limitations. The Eighth Circuit vacated the sentence.

As demonstrated by the decisions in Ousley and Robinson, the Eighth Circuit's decision in this case constitutes a departure from established legal principles. Supreme Court Rule 10 states that a writ of certiorari will be granted only for compelling reasons. Consistent with that standard, the Eighth Circuit's ruling in this case raises an important question of federal sentencing law. The interpretation of Application Note 12 to U.S.S.G. § 2D1.1 affects the public interest in establishing the parameters of punishment in a substantial number of drug prosecutions. In addition to a split in authority on the issue of applying Application Note 12 to "reverse sting" cases, the issue of defining "reasonably capable" remains unanswered -- a circumstance the Court could remedy by issuing a Writ of Certiorari.

CONCLUSION

WHEREFORE, for all of the reasons expressed herein, Mr. Williams respectfully requests the Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on March 28, 1997.

Respectfully submitted

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APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-1043

United States of America, Plaintiff-Appellee,	*	
v.	*	Appeal from the United States District Court for the Western District of Missouri
Johnny Williams a/k/a Doctor John, Defendant-Appellant	*	

Submitted: September 11, 1996

Filed: March 28, 1997

Before MAGILL, FLOYD R. GIBSON, and LAY, Circuit Judges.

FLOYD R. GIBSON, Circuit Judge.

A jury convicted Johnny Williams of attempting to possess five or more kilograms of cocaine with the intent to distribute. See 21 U.S.C. §§ 841 (a) (1), (b) (1) (A), 846 (1994). The district court[1] sentenced Williams to 121 months imprisonment, followed by five years of supervised release. Williams raises several issues on appeal. First, Williams contends that the district court should have suppressed the fruits of the wiretap surveillance of Williams's telephone line because the government failed to comply with the minimization requirements of 18 U.S.C. § 2518 (5) (1994). Second, Williams claims error in the district court's decision to allow the government to introduce records into evidence without laying a proper foundation.

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[1]The HONORABLE HOWARD F. SACHS, Senior Judge, United States District Court for the Western District of Missouri.

Third, Williams asserts that the district court's entrapment instruction prejudiced Williams and prevented him from receiving a fair trial. Finally, Williams raises three sentencing issues. He contends that the district court committed error when it calculated Williams's base offense level at 32, failed to recognize that the government engaged in sentencing entrapment, and failed to grant Williams his right of allocution pursuant to Fed. R. Crim. P. 32(c) (3) (C). For the reasons set forth below, we affirm Williams's conviction and sentence.

I. BACKGROUND

In December 1992 Adriana Roman began transporting cocaine from Houston, Texas to Kansas City, Missouri. In May 1993 Houston Police Detective Virgil Price approached Roman because he suspected she was a drug courier. Roman agreed to act as an informant for the Houston Police Department. Price later introduced Roman to FBI Agent Marlin Ritzman, and in June of 1993 Roman agreed to act as an informant for the FBI. Roman told Ritzman she made the following deliveries of cocaine to Kansas City from Houston: (1) five kilograms in December 1992; (2) five kilograms in early January 1993; (3) five kilograms in late January 1993; (4) eight kilograms in March 1993; and (5) three kilograms in May 1993. Roman told Ritzman that on each occasion she called either Williams or another drug dealer upon her arrival in Kansas City. On the occasions that Roman called Williams, he sometimes directly participated in the transactions, but at other times, Williams sent a messenger to collect the cocaine from Roman.

Based on the information supplied by Roman, the FBI applied for authorization to conduct surveillance of Williams's telephone line pursuant to 18 U.S.C. §§ 2510-2522 (1994). On September 15, 1993, the district court[2] authorized surveillance for a period of thirty days.[3]

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[2]The HONORABLE JOSEPH E. STEVENS, JR., then Chief Judge of the United States District Court for the Western District of Missouri and now Senior United States District Judge for the same court.

[3]During the thirty day surveillance period, the FBI intercepted 219 pertinent conversations and 2,164 nonpertinent conversations. Of the intercepted conversations, 1,172 were minimized to avoid the interception of calls which were noncriminal in nature.

Because the FBI wished to establish Williams's willingness to deal in cocaine, Ritzman directed Roman to initiate contact with Williams. On September 22 Roman called Williams and persuaded him to meet her at a Kansas City motel to discuss a possible cocaine delivery. The FBI video taped the meeting, during which Williams suggested a delivery of one and one-half to two kilograms of cocaine. Roman, at the FBI's direction informed Williams that because she had to travel to Michigan to visit her son, Williams should not expect to hear from her for at least a week. Williams responded that had he known of Roman's plans, she could have delivered the cocaine to him on her way to Michigan and retrieved the purchase money on her return trip through Kansas City. He agreed, however, to accept one and one-half to two kilograms of cocaine as soon as Roman was able to deliver the controlled substances. After the meeting concluded, Ritzman decided to attempt a reverse sting[4] on Williams and instructed Roman not to initiate contact with Williams until advised. However, shortly following the meeting, Roman made unauthorized contact with Williams and asked him to send money so she could rent a car to deliver cocaine to Kansas City. Roman actually made the request for money because she needed cash to pay rent and other bills. Williams, using the alias "Charlie Ward," wired Roman two hundred dollars.

On October 13, 1993, Ritzman received approval to attempt the reverse sting. Roman called Williams on October 13 to confirm delivery for October 14, 1993. As advised by Ritzman, Roman asked Williams if she could bring five kilograms rather than the previously agreed-upon one and one-half to two kilograms. Williams approved of Roman's request to deliver five kilograms of cocaine.

On October 14 the FBI flew Roman to Kansas City and escorted her to the American Inn where the agents planned to execute the reverse sting. The FBI had rented three rooms at the American Inn. Roman was to meet with Williams in one room. The FBI wired another room with audio and video surveillance equipment, and set up the third room to observe Williams as he entered and exited the room in which the reverse sting was to take place. FBI Special Agent Pisterzi obtained five single kilogram packages of cocaine from the

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[4]A reverse sting is "an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant." U.S. Sentencing Guidelines Manual § 2D1.1, application note 15 (1995).

DEA lab in Chicago, which he brought to the hotel for use in the reverse sting. Ritzman placed the packages of cocaine in a gym bag, and placed the bag in one of the hotel rooms with Roman. Shortly after noon, Roman telephoned Williams to tell him she was at the American Inn. Williams arrived soon thereafter.

Williams entered the hotel room and examined the five kilogram packages of cocaine. He took one package out of the gym bag. Williams then resituated the other four packages of cocaine and hid them in the room. Williams gave Roman two hundred dollars so she could get something to eat. He then advised her that he would return shortly for the other four packages of cocaine and that, in the meantime, she should "guard [the cocaine] with [her] life." Williams exited the room with one package of cocaine and was immediately apprehended by Ritzman. Ritzman released Williams based on Williams's promise to cooperate with the FBI. When Williams failed to cooperate, he was indicted and charged with attempting to possess at least five kilograms of cocaine with intent to distribute in violation of 21 U.S.C. §§ 841 (a) (1), (b) (1) (A), 846 (1994). A jury found Williams guilty of the charged offense, and the district court sentenced Williams to 121 months imprisonment followed by five years of supervised release.

II. DISCUSSION

A. Minimization of Wiretap Surveillance

Williams contends that all evidence obtained from the wiretap surveillance should have been suppressed because the government's procedures did not comply with the minimization requirements of 18 U.S.C. § 2518 (5) (1994). Subsection five of 18 U.S.C. § 2518 requires that an order authorizing the interception of wire communications must ensure that the surveillance will "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception . . . ." 18 U.S.C. § 2518 (5) (1994). Whether the government complied with the requirements of section 2518 (5) is determined by an objective, reasonableness standard. See Scott v. United States, 436 U.S. 128, 137-38 (1978); United States v. Macklin, 902 F.2d 1320, 1328 (8th Cir. 1990), cert. denied, 498 U.S. 1031 (1991).

When determining whether the government's surveillance was reasonable, "a reviewing court must consider a variety of factors,

including the scope of the enterprise, the agent's reasonable expectation of the content of a call, the extent of judicial supervision, length and origin of a call, and use of coded or ambiguous language." Macklin, 902 F.2d at 1328 (citation omitted). After a consideration of these factors, we conclude that the government agents in this case acted reasonably in efforts to comply with the minimization requirements of section 2518(5). The order authorizing the wiretap named nine interceptees because at the outset of the investigation the FBI believed many people were involved in the drug trafficking. If an intercepted phone call involved one or more nonnamed interceptees and was noncriminal in nature, the order required the listening agent to minimize the call. The order also required the FBI to submit ten-day reports to the authorizing judge to ensure that proper minimization techniques were being used. Several of the individual phone calls contested by Williams were extremely short in duration. In these calls, listening agents barely had ample time to determine whether the speakers were named interceptees before the calls terminated. Cf. Scott, 436 U.S. at 141-42. The remaining calls challenged by Williams were ambiguous in nature and included language the agents reasonably could have believed was coded language referring to possible cocaine transactions. More extensive wiretapping is reasonable when "the conversations are in the jargon of the drug trade." Macklin, 902 F.2d at 1328 (citation omitted). Therefore, the government agents in this case acted reasonably in efforts to comply with the minimization requirements of section 2518 (5).

B. Evidentiary Foundation

Williams renews the objection he made at trial that records from two hotels and Western Union should not have been admitted into evidence because the government failed to call a custodian of records to lay a foundation for the business records hearsay exception of Fed. R. Evid. 803(6). Williams contends that the records were significant because they corroborated Roman's testimony about her previous involvement in transporting cocaine to Williams from Houston. However, assuming the records were inadmissible hearsay, any error in admitting the records was harmless.

An evidentiary error is harmless if, "after viewing the entire record, the reviewing court determines that no substantial rights of the defendant were affected, and that the error had no, or only slight,

influence on the verdict." United States v. Mitchell, 31 F.3d 628, 632 (8th Cir. 1994) (citations omitted). After a careful examination of the record, we determine that any error in the admission of the records had no effect on Williams's substantial rights and little or no influence on the verdict. To achieve a conviction the government was required to establish that Williams attempted to possess five or more kilograms of cocaine with the intent to distribute the cocaine. See 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846 (1994). If the district court had not permitted the government to introduce the hotel and Western Union records, the remaining evidence would have nonetheless overwhelmingly established William's guilt. The government introduced, inter alia, (1) Roman's testimony regarding Williams's previous involvement in cocaine transactions; (2) tape recorded conversations between Roman and Williams in which Williams alluded to his prior and intended future involvement in cocaine transactions; and (3) most significantly, a video tape of Williams's attempted purchase of five kilograms of cocaine at the American Inn. Consequently, due to the powerful additional evidence of William's guilt, the district's court admission of the records, if erroneous, had little or no influence on the jury's verdict and did not affect Williams's substantive rights.

C. Entrapment Instruction

Williams urged the district court to use Eighth Circuit Pattern Instruction 9.01 to instruct the jury on the law of entrapment. The court modified Instruction 9.01 by adding a paragraph in an attempt to clarify the factual predicate required for finding of entrapment. Williams argues that the district court abused its discretion in submitting Instruction J[5] to the jury because the modified version was confusing

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[5]Instruction J read as follows:

One of the issues in this case is whether Mr. Williams was entrapped. If Mr. Williams was entrapped, he must be found not guilty. The Government has the burden of proving beyond a reasonable doubt that Mr. Williams was not entrapped.

If Mr. Williams before contact with Adriana Roman in the summer of 1993 did not have any disposition to commit the crime charged and was induced or persuaded by Adriana Roman to commit that crime, then he was entrapped. On the other hand, if Mr. Williams before contact with Adriana Roman in the summer of 1993 did have a disposition to commit the crime charged then he was not entrapped, even though Adriana Roman provided a favorable opportunity to commit the crime or made

(footnote continues on bottom of next page)

and tended to emphasize the government's version of the facts. We review a district court's formulation of jury instructions for an abuse of discretion. See United States v. Parker, 32 F.3d 395, 400 (8th Cir. 1994). Although a defendant is entitled to have an instruction submitted to the jury provided it is timely submitted, adequately states the law, and is supported by the evidence, see United States vs. Akers, 987 F.2d 507, 513 (8th Cir. 1993), "the defendant is 'not entitled to a particularly worded instruction where the instruction [] given by the trial judge adequately and correctly cover[s] the substance of the requested instruction.'" Id. (alterations added) (quoting United States v. Manning, 618 F.2d 45, 48 (8th Cir. 1980)).

Entrapment exists "where the evidence establishes that the government agent originated the criminal design, the agent implanted in the mind of an innocent person the disposition to commit the offense, and the defendant then committed the criminal act at the urging of the government agent." United States v. Hulett, 22 F.3d 779,781 (8th cir.) (citation omitted), cert. denied, 115 S. Ct. 217 (1994). Williams asserts that the last paragraph of Instruction J "improperly emphasized factual contentions raised by the government," and therefore made it less likely that the jury would find the government entrapped Williams. We disagree. Instruction J's final paragraph presented a relatively neutral clarification of the law of entrapment based on the facts of the case. When considered in its entirety, the instruction essentially asked the jury to determine "whether [Roman] caused or induced [Williams] to commit a crime he was not otherwise predisposed to commit." Id. (citation omitted). Because the district court's entrapment instruction adequately stated the law of entrapment and covered the substance of Williams's requested instruction, we find that the district court did not abuse its discretion in submitting Instruction J to the jury.

(footnote continued from previous page)

committing the crime easier or even participated in acts essential to the crime.

If the proof has persuaded you, beyond a reasonable doubt, that (1) defendant Williams knew or suspected, before the summer of 1993, that Adriana Roman had been engaged in drug trafficking, and (2) defendant thereafter invited or encouraged her to supply drugs to him, and (3) defendant Williams was willing to deal in drugs, and did not require persuasion from Adriana Roman, then he was not entrapped, even though Adriana Roman presented defendant with an opportunity to acquire cocaine. If the proof has not persuaded you beyond a reasonable doubt that defendant was not entrapped, as that term is here explained, then you must find the defendant not guilty.

D. Sentencing Issues

1. Weight Calculation

The sentencing court found that Williams was responsible for at least five but not more than fifteen kilograms of cocaine and accordingly calculated his base offense level at 32. See U.S. Sentencing Guidelines Manual § 2D1.1 (c) (4) (1995). The court sentenced Williams to 121 months imprisonment, which was within the guidelines range of 121-151 months. Williams contests the weight calculation, arguing that he did not intend to purchase nor was he reasonably capable of purchasing five kilograms of cocaine. See id., application note 12.

We review factual findings by the sentencing court for clear error and reverse only "if we are left with the definite and firm conviction that the sentencing court erred." United States v. Garrido, 995 F.2d 808, 812 (8th Cir.) (citation omitted), cert. denied, 510 U.S. 926 (1993). We review the sentencing court's application of the Sentencing Guidelines de novo. See United States v. Stavig, 80 F.3d 1241, 1245 (8th Cir. 1996). We may affirm the sentencing court's decision on any ground supported by the record. See Garrido, 995 F.2d at 813.

The Presentence Investigation Report (PSI) prepared by the probation officer recommended that the sentencing court hold Williams accountable for twenty-eight kilograms of cocaine that were part of the same course of conduct as the charged offense. See id. § 1B1.3. Had the district court followed this recommendation, Williams's base offense level would have been 34, requiring a sentence of 151-181 months. See id. § 2D1.1 (c) (3). The court, however, found that Roman's testimony was not sufficiently reliable to attribute twenty-eight kilograms of cocaine to Williams as relevant conduct. Furthermore, the cocaine used in the reverse sting was "a shade short of the five kilograms" because it was not weighed separately from its wrappings. Nonetheless, the district court estimated that Williams was responsible for between five and fifteen kilograms of cocaine. The sentencing court based this estimation on two alternative theories. First, the court adduced that Williams could be held accountable for between five and fifteen kilograms of cocaine because although Roman's testimony regarding relevant conduct was not entirely reliable, it sufficiently established that Williams was at least 5%

culpable for the previous twenty-eight kilograms, which placed Williams at or above the five kilogram threshold. Alternatively, the court reasoned that Williams should be held responsible for five kilograms of cocaine because that was the amount he intended to purchase from Roman.

Williams asserts that the sentencing court committed clear error when it set his base offense level at 32 based on his prior relevant conduct. Williams claims that the sentencing court arbitrarily allocated his level of culpability and failed to make specific factual findings of his involvement in the previous transactions as required by Fed. R. Crim. P. 32(c). We agree that the sentencing court arbitrarily allocated Williams's level of involvement in the previous transactions. Although the sentencing guidelines allow for the approximation of the amount of controlled substances involved in prior relevant transactions, U.S. Sentencing Guidelines Manual §2D1.1, application note 12 (1995), a sentencing court may not base a quantity determination upon an arbitrary assumption. See United States v. Lawrence, 915 F.2d 402, 409 (8th Cir. 1990). Similarly, we hold that a sentencing court may not base a determination of a defendant's level of involvement in previous transactions upon an arbitrary assumption. A sentencing court may not attribute responsibility to a defendant for quantities of cocaine involved in a previous transaction "unless the court can conclude the defendant is more likely than not actually responsible for a quantity greater than or equal to the quantity for which the defendant is being held responsible." United States v. Walton, 908 F.2d 1289, 1302 (6th Cir.) (emphasis in original), cert. denied, 498 U.S. 990 (1990); accord Lawrence, 915 F.2d at 409.

At Williams's sentencing hearing the court indicated its discomfort with assessing Williams's level of involvement in previous transactions. The court stated:

> Well, I think the basic trouble I have is pegging a figure.
>
> . . . If we don't hold him for the total, then I don't think I can rely on the Adriana Roman testimony to say, well, it was this transaction, and there were a certain number of kilograms there and so forth.
>
> The closest thing to that is the Paradise Motel. If her testimony is as confused as I believe it was . . . I am not comfortable saying, well, I believe

> he was out at the Paradise Motel and that there were a certain number of kilograms.
>
> . . . [T]he Eighth Circuit will have to give me some guidance as to whether I can pick a number out of the air.

Sentencing Tr. at 30-32. Later, the court stated that Williams's responsibility for prior transactions "[could] not be fairly estimated." Id. at 88. Nonetheless, the court determined that Williams could be held accountable for between five and fifteen kilograms of cocaine because Roman's testimony regarding relevant conduct sufficiently established that Williams was at least 5% culpable for the previous transactions. Such an arbitrary allocation of a defendant's involvement in previous transactions is impermissible.

Nevertheless, we conclude that five kilograms was the appropriate weight of cocaine to attribute to Williams under application note twelve of section 2D1.1 because that is the amount of cocaine Williams agreed to purchase from Roman. U.S. Sentencing Guidelines Manual § 2D1.1, application note 12 (1995).

The relevant portion of application note twelve provides:

> In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is complete and the amount delivered more accurately reflects the scale of the offense. . . . In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing.

Id.

The application note plainly states that in a reverse sting the agreed-upon quantity of cocaine determines the offense level. Because Williams agreed to purchase five kilograms of cocaine, he should be sentenced based on that amount. On September 22, 1993, Roman and Williams met in a motel room to discuss the possibility of future cocaine transactions. During the meeting, Williams assured Roman that he would be able to sell the cocaine if she could deliver it to Kansas City. Williams indicated an interest in purchasing one and one-half to two kilograms of cocaine, but hinted toward future deals where he would purchase larger amounts. During a September 25 phone call Roman suggested a purchase price of $18,000 per kilogram which Williams agreed was a very good price. Williams sent Roman $200 to enable her to transport the cocaine to Kansas City. Roman called Williams on October 13 to inform him that she had the cocaine and would be arriving in Kansas City the next day. However, she asked Williams if she could bring five kilograms rather than the previously agreed-upon one and one-half to two kilograms. Williams immediately responded that a five kilogram amount was acceptable. On October 14 Williams met Roman at the motel to complete the transaction. When Roman displayed the five kilogram packages of cocaine, Williams instantly embraced her. Williams asked Roman several questions to solidify the terms of the deal. He asked if the price was still $18,000 per kilogram, if each package actually weighed a kilogram, and how much compensation Roman expected for transporting the cocaine. Williams gave Roman clear directions that he would take one kilogram right away and would return later that afternoon for the other four packages. Williams instructed Roman that until he returned, she should guard the other four kilograms "with [her] life." Williams admitted at trial that he planned on returning for the remaining four kilograms. Trial Tr. at 453. Based on his own words and actions, Williams agreed to purchase five kilograms of cocaine. Therefore, application note twelve requires that he be sentenced based upon that amount.

Williams also contends that the sentencing court erred when it failed to make specific factual findings of his involvement in previous transactions as required under Fed. R. Crim. P. 32(c)(1). Because Williams's sentence is affirmed based only upon the amount of cocaine involved in the reverse sting transaction, rather than past relevant transactions, any error the sentencing court may have made in failing

to make specific factual findings under Rule 32(C)(1) amounted to harmless error. See United States v. Beatty, 9 F.3d 686, 690 (8th Cir. 1990) (applying harmless error analysis to improper factual findings under Rule 32).

Williams argues that the last sentence of application note 12 applies to reverse sting operations and that therefore his sentence should not be based on five kilograms of cocaine because he did not intend to purchase nor was he reasonably capable of purchasing the amount. Prior to the 1995 amendment to application note 12, that language of the note did not specify whether it applied to reverse sting operations.[6] This Court, though, interpreted the previous version of application note twelve as applying to reverse stings, see Stavig, 80 F.3d at 1246; United States v. Nichols, 986 F.2d 1199, 1204 (8th Cir. 1993), including the portion of the note which stated that a defendant would not be sentenced based on the full amount of controlled substances involved if he "did not intend to produce and was not reasonably capable of producing" the negotiated amount. U.S. Sentencing Guidelines Manual § 2D1.1, application note twelve (1994); see Stavig, 80 F.3d at 1246; Nichols, 986 F.2d at 1204. Although the 1995 amendment to note twelve explicitly clarifies that the agreed-upon quantity of cocaine controls the weight determination in a reverse sting operation, the amendment renews speculation as to whether a sentencing court is required to exclude from consideration "the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing." U.S. Sentencing Guidelines Manual § 2D1.1, application note 12 (1995).

Currently, only the Court of Appeals for the Second Circuit has ruled on whether the last sentence of note twelve applies to reverse

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[6]The previous version of note twelve read in relevant part:

> In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

U.S. Sentencing Guidelines Manual § 2D1.1, application note 12 (1994).

stings. United States v. Gomez, 103 F.3d 249 (2nd Cir. 1997). The Second Circuit concluded that the last sentence of note 12 applies only in conventional sting operations where the defendant is the supplier rather than the buyer of controlled substances. Id. at 253-54.[7] Prior to the amendment of application note twelve, this Court,[8] as well as most other circuit courts of appeals,[9] required a sentencing judge to reduce a defendant's sentence by the amount of controlled substances the defendant did not intend to purchase and was not reasonably capable of purchasing.[10]

This panel is split on the issue of whether the last sentence of

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[7]The Court reasoned that the plain language of the sentence in question refers only to a situation in which a defendant does not intend to or is not reasonably capable of producing controlled substances, as opposed to a situation in which the defendant does not intend to or is not reasonably capable of producing the funds necessary to purchase the controlled substances. See Gomez, 103 F.3d at 253. The court noted that " '[w]here a seller neither intends nor is able to produce the [agreed-upon] quantity of narcotics, the Guidelines simply recognize that the crime could not have been committed as planned. Where the defendant is a buyer, however, and [agrees upon] a particular quantity, he or she fully intends to commit the crime as planned.' " Id. (quoting United States v. Alaga, 995 F.2d 380, 383 (2nd Cir. 1993), cert. denied, 510 U.S. 1075 (1994)).

[8]See Stavig, 80 F.3d at 1246; Nichols, 986 F.2d at 1204; United States v. Brown, 946 F.2d 58, 60 n.3 (8th Cir. 1991); but see United States v. Robinson, 22 F.3d 195, 196 (8th Cir. 1994) (stating uncertainty as to note twelve's application to reverse sting operations).

[9]See United States v. Naranjo, 52 F.3d 245, 250 n.12 (9th Cir. 1995); United States v. Jean, 25 F.3d 588, 598 (7th Cir. 1994); United States v. Brown, 985 F.2d 766, 768-69 (5th Cir. 1993); United States v. Gates, 967 F.2d 497, 500 (11th Cir.), cert. denied, 506 U.S. 1011 (1992); United States v. Panet-Collazo, 960 F.2d 256, 261 (1st Cir.), cert. denied, 506 U.S. 876 (1992); United States v. Brooks, 957 F.2d 1138, 1150-51 (4th Cir.), cert. denied, 505 U.S. 1228 (1992). But see United States v. Alago, 995 F.2d at 383.

[10]The current version of note twelve requires the court to exclude from the offense level determination the amount of controlled substances either that the defendant did not intend to produce or was not reasonably capable of producing. U.S. Sentencing Guidelines Manual § 2D1.1, application note 12 (1995). The previous version of note 12, however, required the court to exclude the amount from consideration only when the defendant could show both that he did not intend to produce and was not reasonably capable of producing the negotiated amount. U.S. Sentencing Guidelines Manual § 2D1.1, application note 12 (1994). We modify our analysis to reflect this change.

the 1995 version of note twelve applies to reverse stings. We need not decide the scope of note twelve's application in this case, leaving that issue to another day, because even if we applied the last sentence of note twelve to reverse sting operations, Williams both intended to and was reasonably capable of purchasing the agreed-upon five kilograms of cocaine. As noted by the sentencing court, Williams never declined the five kilogram transaction and, in fact, seemed "jubilant over the prospect." Sentencing Tr. at 87. Thus, Williams signaled his intent to proceed as planned. We similarly conclude that Williams was reasonably capable of purchasing the agreed-upon five kilograms of cocaine. Williams indicated that he would sell the cocaine to his contacts and then would pay Roman $18,000 per kilogram from the proceeds of his sales plus an additional $1,500 per kilogram bonus for Roman's part in the transaction. When Williams met Roman on Thursday, October 14 he assured her that he would have half of the money by Saturday. At all times, Williams appeared to be confident that he would have no problem selling the cocaine and providing payment at an acceptable time.[11] We therefore conclude that, if the last sentence of application note twelve applies to reverse sting defendants, Williams intended to purchase and was reasonably capable of purchasing five kilograms of cocaine.

2. Sentencing Entrapment

Williams further argues that the sentencing court should have reduced the weight of cocaine used to calculate his base offense level because the government engaged in sentencing entrapment.[12] Sen-

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[11]We note that "fronting" cocaine on a credit basis is an accepted practice in the drug trade. See Nichols, 986 F.2d at 1205; United States v. O'Meara, 895 F.2d 1216, 1220-21 (8th Cir.), cert. denied, 498 U.S. 943 (1990).

[12]Williams characterizes the government's conduct as "sentencing manipulation." However, Williams contends that the government lured him into purchasing a larger quantity of cocaine than he was predisposed to purchase before his contact with Roman. This situation accurately describes sentencing entrapment, see United States v. Shephard, 4 F.3d 647, 649 (8th Cir. 1993), cert. denied, 510 U.S. 1203 (1994), while sentencing manipulation more aptly refers to a scenario in which the government prolongs an investigation merely to increase the sentence. Id. We therefore approach Williams's argument as one alleging sentencing entrapment rather than sentencing manipulation.

tencing entrapment occurs " 'where outrageous government conduct overcomes the will of a defendant predisposed to deal only in small quantities of drugs, for the purpose of increasing the amount of drugs and the resulting sentence imposed against that defendant.' " Stavig, 80 F.3d at 1245 (quoting United States v. Aikens, 64 F.3d 372, 376 (8th Cir. 1995), cert. granted and judgment vacated on other grounds, 116 S. Ct. 1346 (1996). This is simply not a case where the government overcame the defendant's predisposition to deal in small amounts of cocaine. The evidence established Williams's predisposition to deal in five kilogram quantities of cocaine.

3. Allocution

Finally, Williams asserts that the case should be remanded for resentencing because the district court failed to provide him with his right of allocution as required by Fed. R. Crim. P. 32(c)(3)(C). Rule 32(c)(3)(C) requires the district court, before imposing a sentence upon the defendant, to address the defendant personally and inquire whether the defendant wishes to make a statement in mitigation of his sentence. Failure to comply with this rule mandates remand for resentencing. See United States v. Walker, 896 F.2d 295, 301 (8th Cir. 1990). However, if, after imposing the sentence, a trial judge realized the defendant has not been afforded his right to allocution, the judge may correct the omission by reopening the sentencing proceeding and subsequently addressing the defendant pursuant to Rule 32. See United States v. Barnes, 948 F.2d 325, 331 n.5 (7th Cir. 1991) ("[A] trial judge, realizing after sentencing that the right of allocution has been neglected, may rectify the situation by, in effect, setting aside the sentence, reopening the proceeding, and inviting the defendant to speak."); United States v. Pelaez, 930 F.2d 520, 523-24 (6th Cir. 1991) (reversing a sentence because the district court had no intention of reconsidering the sentence, even though defendant was given an opportunity to address the court following sentencing); Gordon v. United States; 438 F.2d 858, 882 (5th Cir. 1971) (affirming the district court's sentence where defendant was given an opportunity to address the court after the court imposed and initial sentence but before the sentencing proceeding concluded, cert. denied, 404 U.S. 828 (1971). This case presents a situation where the sentencing judge realized his failure to call upon the defendant and remedied the error by subsequently addressing the defendant and allowing him to speak in

mitigation of his sentence. After the sentencing judge announced Williams's sentence, the following exchange took place:

> [WILLIAMS]: Your Honor, may I say something?
>
> THE COURT: Yes.
>
> [WILLIAMS]: I know the sentence has been --
>
> THE COURT: I am sorry. I have made a serious mistake in not calling on you before sentencing.
>
> [WILLIAMS]: I am sorry.
>
> THE COURT: No, I am glad that you said you want to say something, because you are entitled to address me before sentencing.
>
> So, you tell me anything you want to. I am not going to read this again, but I will consider whatever you have to say.

Sentencing Tr. at 96. After Williams informed the court of many concerns he had regarding the investigation of the case, the sentencing judge addressed Williams's attorney:

> THE COURT: Mr. Bath, I did misspeak in reading the sentencing material before calling on Mr. Williams. I am sentencing him to the minimum under my findings.
>
> If there is a desire for me to make some further record of reconsidering and sentencing, again after hearing from him, I would do that.
>
> MR. BATH: No, sir, we don't have that request, Your Honor.

Sentencing Tr. at 101. We conclude that the sentencing judge corrected his initial failure to provide Williams's right of allocution by subsequently allowing Williams to address the court and asking

Williams's attorney if he would like him to re-read the sentence after considering Williams's testimonial. Therefore, Williams was accorded his right of allocution pursuant to Rule 32(c)(3)(C), and resentencing is not required.

III. CONCLUSION

For the reasons set forth above, we affirm Williams's conviction and sentence.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

AO 245 S (Rev. 7/92) Sheet 1 - Judgment in a Criminal Case

66PC

UNITED STATES DISTRICT COURT

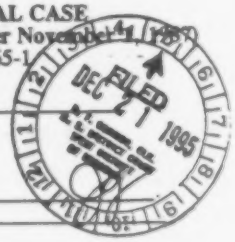
Western District of Missouri

UNITED STATES OF AMERICA
V.
JOHNNY WILLIAMS
(a.k.a. JOHN , DOCTOR)

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 4:95CR00165-1

Thomas Bath, Jr.
Defendant's Attorney



THE DEFENDANT:
[ ] pleaded guilty to count(s) _____
[ ] pleaded nolo contendere to count(s) _____
which (was) (were) accepted by the court.
[X] was found guilty on count(s) Ct. 1 on 8/23/95
after a plea of not guilty.

Title/Sect	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC §841(a)(1)(b)(1)(A) §846	Attempt to Possess with Intent to Distribute Cocaine, in an amount of 5 Kilograms or More.	10/14/93	

The defendant is sentenced as provided in pages 1 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____
and is discharged as to such count(s).
[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 430-84-5950
Defendant's Date of Birth: 11/28/47

12/20/95
Date of Imposition of Judgment

Signature of Judicial Officer

Defendant's Mailing Address:

7102 EAST 134TH TERRACE
GRANDVIEW MO 64030

Howard F. Sachs
Senior Judge
Name & Title of Judicial Officer

Defendant's Residence Address:

7102 EAST 134TH TERRACE
GRANDVIEW MO 64030

12/21/95
Date

I HEREBY ATTEST AND CERTIFY ON 12-22-95 THAT THE FOREGOING DOCUMENT IS A FULL TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE AND IN MY LEGAL CUSTODY.

ORIGINAL CLERK, U.S. DISTRICT COURT, WESTERN DISTRICT OF MISSOURI

DEPUTY CLERK

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BEST AVAILA

AO 245 S (Rev. 7/92) Sheet 2 - Imprisonment

DEFENDANT: JOHNNY WILL[illegible]IS
CASE NUMBER: 4:9[illegible]CR00165 - A

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 121 months.

121 months on Count(s): 1

Payments on the fine shall, if possible, commence during incarceration with any remaining balance to be paid during supervision. Interest is Waived. The costs of incarceration and supervision are

(imprisonment text continued on page 2.01)

[X] The court makes the following recommendations to the Bureau of Prisons:

Leavenworth, if adequate medical treatment can be provided, if not a medical facility in Springfield, Missouri, or a facility as near the Kansas City area as is feasible.

[X] The defendant is remanded to the custody of the United States Marshal.
[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at _____ am/pm on _____ .
[ ] As notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
[ ] before 2:00 p.m. on _____ .
[ ] As notified by the United States Marshal.
[ ] As notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at

_____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy Marshal

BLE COPY

IMPRISONMENT

(imprisonment text continued from page 2)

waived in this case. (This waiver does not include any subsistence which may be required by the Bureau of Prisons in community-based programs.)

DEFENDANT: JOHNNY WILLIAMS
CASE NUMBER: 4:99CR00165 - 1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 years.

5 years as to Count(s): 1

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall not possess a firearm or destructive device. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the schedule of payments set forth in the financial obligation portion of this Judgment. The defendant shall comply with the following additional conditions:

Provide Probation Office with access to any requested financial information.

Not incur new credit charges or open additional lines of credit without the approval of the Probation Office.

Successfully participate in any substance abuse counseling program, which may include chemical or Breathalyzer testing, as directed by the Probation Office, and pay any associated costs, as directed by the Probation office.

Notify the Probation office at least 10 days prior to a change of residence.

Any remaining fine balance to be paid during the period of supervision.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245 S (Rev. 7/92) Sheet 5 - Financial Obligations

DEFENDANT: JOHNNY WILL[illegible]IS
CASE NUMBER: 4:97CR00165 - [illegible]

FINANCIAL OBLIGATIONS

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below:

Count	Assessment	Fine	Restitution
1	$ 50.00	$ 17,500.00	$
Totals:	$ 50.00	$ 17,500.00	$

FINE

The fine includes any costs of incarceration and/or supervision.

[X] The court has determined that the defendant does not have the ability to pay interest in full. It is ordered that:

[X] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

Each restitution payment shall be divided proportionately among the payees named unless specified in the priority payment column below. Restitution shall be paid to the following persons in the following amounts:

Name of Payee	Amount of Restitution	Priority Order of Payment

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) fine costs; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be paid as follows:

[ ] in full immediately.

[ ] in full not later than _____.

[X] in installments which the probation officer shall establish and may periodically modify provided that the entire financial penalty is paid no later than 5 years after release from incarceration, if incarceration is imposed. If probation is imposed, not later than the expiration of probation.

[ ] in monthly installments of $ _____ over a period of _____ months. The probation officer may periodically modify the payment schedule, provided the penalty is paid in full in accordance with the term specified above. The first payment is due 30 days after the date of this judgment. The second and subsequent payments are due monthly thereafter.

All financial penalty payments are to be made to the Clerk of the Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All of the above payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

Unless otherwise ordered by the court, any financial penalty imposed by this order shall be due and payable during the period of incarceration, with any unpaid balance to be a condition of supervised release. Any financial penalties collected while the defendant is incarcerated shall be reported by the Bureau of Prisons to the Clerk of the Court and the probation officer. The probation officer shall notify the United States District Court, the Clerk of the Court, and the United States Attorney's Office of the payment schedule and any modifications to that schedule.

AO 245 S (Rev. 7/97) Sheet 6 - Statement of Reasons

DEFENDANT: JOHNNY WILLIAMS
CASE NUMBER: 4:97CR00165 - 1

STATEMENT OF REASONS

[ ] The Court adopts the factual findings and guideline application in the presentence report.

OR

[X] The Court adopts the factual findings and guideline application in the presentence report except

The presentence report is adopted, except as follows:

(exception text continued on page 5.01)

Guideline Range Determined by the Court:

Total Offense Level: 32
Criminal History Category: I
Imprisonment Range: 121 to 151 months and ____ months consecutive.
Supervised Release Range: ____ to 5 years
Fine Range: $ 17,500.00 to $ 4,000,000.00
[ ] Fine waived or imposed below the guideline range, because of inability to pay.
Restitution: $_____
[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):

Even if defendant's Guideline sentence were less that the 10 year statutory minimum, I do not think he has qualified himself for a sentence below the statutory minimum. He has not been adequately candid, and I have not been convinced that he has supplied all information known to him. It is possible of course that he might render substantial assistance within the next year and qualify for a reduction.

OR

[ ] The sentence departs from the guideline range
[ ] upon motion of the government, as a result of defendant's substantial assistance.
[ ] for the following reason(s):

STATEMENT OF REASONS

(exception text continued from page 5)

Defendant's criminal responsibility is assessed at 5 kilograms or more, but less than 15 kilograms of cocaine, placing the offense level at 32, with a Guideline range of 121 to 151 months. Although Adriana Roman suggested that amount, at the suggestion of the Government, defendant readily agreed to take 5 kilograms of cocaine and ultimately did so enthusiastically. His personal resources may have been inadequate for such a purchase, but he repeatedly stated he had contacts who would readily make purchases, and even if he was exaggerating, which has not been estalished, he will be held to his assertions. Even though defendant preferred to begin slowly with 1 1/2 to 2 kilograms, he never declined a 5 kilogram operation, and in the "Big Mama" call on October 14 he was jubilant over the prospect.

It is obvious he played a material role in assisting Perez in earlier drug dealings with Roman, and had become known to her because of Perez's activities. I accept defendant's theory that he was drawn into the Perez activities because of the woman living at his house. Defendant's responsibility for the prior activities, which may have totalled up to some 26 kilograms, cannot be fairly estimated, but at a minimum should probably be several kilograms more than the 5 kilogram transaction that caused defendant's arrest.* I consider Roman believable in general, but not on detailed identification of transactions. I believe she was confused and engaging in guesswork. I am not now comfortable with specifically attributing to defendant the cocaine in the Paradise Motel transaction in January, but that does not change the Guideline. Roman was clearly wrong, for example, in identifying Mildred Carney as Frenchie and as a person culpably involved in drug transactions.

I believe defendant has marketable skills to pay th emiminum fine, eigher throug prison earnings (in part) or during a five-year period of supervised rlease.

* If I were to use a "comparative fault" analysis, which would be novel in this context but is used in other areas of the law, defendant could be assessed 10% responsibility for the Perez activities testified to by Roman, and even 5% would surely put his responsibility above the 5 kilogram requirement for an offense level of 32 (the alternate way of reaching this total is to use defendant's intention to acquire 5 kilograms, which is the method advocated by the Government and which I believe to be sound).

HFS

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-1043WMKC

United States of America, Appellee	*	
	*	Order Denying Petition for
vs.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
Johnny Williams, Appellant.	*	

The suggestion for rehearing en banc is denied. The Petition for rehearing by the panel is also denied.

May 12, 1997

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit